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Liability of a Successor Corporation for Products Defectively Manufactured by a Predecessor

Jones v. Johnson Machine and Press Company, 211 Neb. 724, 320 N.W.2d 481 (1982).

I. INTRODUCTION

On July 8, 1977, Danny Jones lost several fingers when his hand was caught in a Johnson punch press while attempting to free a piece of metal that had become jammed in the press.¹ Although persons injured by allegedly defective products can normally seek compensation for their injuries from the manufacturer of the machine,² and although the Johnson line of presses continues to be manufactured, Jones' claim was barred because the original manufacturer of the press had sold its business and dissolved years before the injury.³

The question of whether a corporate successor can be held liable for the injuries caused by a product defectively manufactured by its predecessor has, until recently, been governed exclusively by the law of corporations. As the law of strict products liability has developed, some courts have eschewed the traditional corporate law analysis of such liability in favor of an analytical framework more readily disposed toward the underlying policy justifications of strict liability.⁴ In *Jones v. Johnson Machine and*

1. Brief for Appellant at 5, *Jones v. Johnson Mach. and Press Co.*, 211 Neb. 724, 320 N.W.2d 481 (1982).

2. Nebraska adopted the doctrine of strict liability for manufacturers of defective products in *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971). For a discussion of Nebraska products liability law, see *infra* notes 104-07 and accompanying text.

3. For a more detailed factual recitation and a discussion of the subsequent corporate history of Johnson Machine and Press Company, see *infra* notes 66-67 and accompanying text.

4. A number of policy concerns have been offered to support the imposition of strict liability for defectively manufactured products. The following list is representative:

Press Co., however, the Nebraska Supreme Court chose not to follow this trend, and instead relied on the traditional corporate law analysis.

This Note will first discuss the traditional corporate law approach, its expansion and its abandonment by some courts. It will then discuss the results reached by other courts faced with the same corporate history involved in *Jones*. Finally, it will analyze *Jones* in light of those cases, and suggest alternative holdings which would be preferable to the result obtained in *Jones*.

II. DEVELOPMENT OF SPECIAL TREATMENT FOR PRODUCTS LIABILITY CLAIMS AGAINST SUCCESSORS TO CORPORATE ASSET SALES

A. The Traditional Corporate Law Rule

A corporation wishing to dissolve has several options available. The assets may be distributed directly to the shareholders, or they may be acquired by a third party and the consideration distributed

A. The consumer finds it too difficult to prove negligence against the manufacturer.

B. Strict liability provides an effective and necessary incentive to manufacturers to make their products as safe as possible.

C. *Res ipsa loquitur* is in fact applied, in some cases, to impose liability upon producers who have not in fact been negligent; therefore negligence should be dispensed with.

D. Reputable manufacturers do in fact stand behind their products, replacing or repairing those which prove to be defective; and many of them have express agreements to do so. Therefore all should be responsible when an injury results from a normal use of the product.

E. The manufacturer is in a better position to protect against harm, by insuring against liability for it, and, by adding the cost of the insurance to the price of his product, to pass the loss on to the general public.

F. Strict liability already can be accomplished by a series of actions, in which the consumer first recovers from the retailer on a warranty, and liability on warranties is then carried back through the intermediate dealers to the manufacturer. The process is time-consuming, expensive, and wasteful; there should be a short-cut.

G. By placing the product on the market, the seller represents to the public that it is fit; and he intends and expects that it will be purchased and consumed in reliance upon that representation. The middleman is no more than a conduit, a mechanical device through which the thing sold reaches the consumer.

H. The costs of accidents should be placed on the party best able to determine whether there are means to prevent that accident. When those means are less expensive than the costs of such accidents, responsibility for implementing them should be placed on the party best able to do so.

W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 764-65 (7th ed. 1982).

to the shareholders. Since an intact, going business concern is generally considered to be more valuable than the sum of its parts,⁵ sound business policy dictates that both the acquiring and disposing entities attempt to effect the transfer of the entire business.

There are three ways in which a corporation can acquire or absorb another corporation:⁶ (1) statutory merger or consolidation,⁷ (2) purchase of the stock of the acquired corporation, and (3) purchase of the acquired corporation's assets. Both merger and purchase of stock result in the acquiring corporation's assumption of the liabilities of the disposing corporation.⁸ These liabilities include claims by persons injured by defective products manufactured by the disposing corporation.⁹ Conversely, purchase of the acquired corporation's assets generally does not result in assumption of the acquired corporation's liabilities by the buyer.¹⁰

5. 1 A. DEWING, *THE FINANCIAL POLICY OF CORPORATIONS* 281 (5th ed. 1953).

6. See generally B. FOX & E. FOX, *Corporate Acquisitions and Mergers*, in 13A *BUSINESS ORGANIZATIONS* §§ 23.01-23.04 (1975); Stephan, *Acquisition Trouble Spots*, 21 *BUS. LAW.* 401, 401-03 (1966).

7. See 15 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 7041 (rev. perm. ed. 1973) [hereinafter cited as FLETCHER]. The manner in which assumption of the seller's liabilities is treated is the same for both merger and consolidation. *Id.* Further references, therefore, will be only to mergers.

8. A merger is a "combination involving the fusion of two constituent corporations, pursuant to a formal agreement executed with reference to specific statutory merger provisions, under which the stock of one corporation . . . is converted into stock of the other." W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 1444 (5th ed. 1980). For an example of a typical statutory merger scheme, see MODEL BUSINESS CORP. ACT § 71 (rev. ed. 1979). Nebraska's merger procedure is contained in NEB. REV. STAT. § 21-2070 (1977). The various state statutes governing merger uniformly provide that the surviving corporation is liable for all liabilities and obligations of the merged corporation. See, e.g., NEB. REV. STAT. § 21-2075(5) (Supp. 1982); MODEL BUSINESS CORP. ACT § 76(e) (rev. ed. 1979).

In a transaction involving a sale of corporate stock, the original corporate entity continues to exist and therefore retains its liabilities. See Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U. L. REV. 86, 93 (1975). Thus, there is no actual assumption of liabilities by the purchasing corporation, but there is an economic assumption because the corporate entity is acquired intact. Freling, *Tax Consequences of Nontax Motivated Aspects and Factors in the Sale of a Corporate Business*, 21 *INST. ON FED. TAX'N* 1107, 1131 (1963).

9. *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 411, 244 N.W.2d 873, 875 (1976). The general proposition that the surviving corporate party in a statutory merger transaction is liable for the torts of the dissolving corporation is stated in 15 FLETCHER, *supra* note 7, at § 7121.

10. 15 FLETCHER, *supra* note 7, at § 7122. This creates a hardship for persons injured by defective products manufactured by the selling corporation. Most asset acquisition contracts call for the voluntary dissolution of the selling corporation pursuant to the applicable state statute. See Note, *Expanding the Products Liability of Successor Corporations*, 27 *HASTINGS L.J.* 1305, 1309

The rule of non-liability in the case of a purchase of a corporation's assets is essentially a corollary of the traditional rule of property law which states that a bona fide purchaser of property who gives adequate consideration and does not have notice of prior claims is not liable when those claims subsequently become known.¹¹ As long as the consideration received by the selling corporation for its assets is adequate, the traditional rule does not impair the rights of business creditors.¹² Since business creditors' claims will be known, and will have accrued as of the time of dissolution, they can seek satisfaction of those claims from the proceeds of the sale prior to distribution to the shareholders. However, since many product liability claims arise years after the original manufacturer of the product has dissolved, product liability plaintiffs are often precluded from asserting their claims against the manufacturer.¹³ Hence, although the traditional corporate rule seems adequate in the area of creditor protection, it often works an extreme hardship on the product liability plaintiff.

The rule of non-liability in the case of an assets acquisition is subject to four generally recognized exceptions. As stated by the Nebraska Supreme Court, liability may be imposed on the purchasing corporation

- (1) [w]hen the purchasing corporation expressly or impliedly agreed to

(1976). See also *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977); *Domine v. Fulton Iron Works*, 76 Ill. App. 3d 253, 395 N.E.2d 19 (1979); *Johnson v. Marshall & Huschart Mach. Co.*, 66 Ill. App. 3d 766, 384 N.E.2d 141 (1978). Most state dissolution statutes provide that the dissolving corporation remain in existence, usually for two to three years, solely for the purpose of being sued. See generally MODEL BUSINESS CORP. ACT § 105 (rev. ed. 1979) (two-year survival of claims). The Nebraska statute providing for survival of remedies upon dissolution, NEB. REV. STAT. § 21-20,104 (1977), is nearly identical to the Model Act. Other state statutes are collected in MODEL BUSINESS CORP. ACT ANN. 2D § 105 (Supp. 1977). The Model Act, which has been adopted in approximately one-half of the states, provides for assertion of only those claims which accrue prior to the filing of the Statement of Intent to Dissolve. Thus, in those states which have adopted the Model Act, a products liability plaintiff injured subsequent to the sale of assets would not be able to assert his claim against the manufacturing corporation. Since many injuries caused by defective products occur years after the manufacture of those products, the plaintiff may be precluded from asserting his claim against the manufacturer even in states which allow suit to be brought on claims arising during the winding-up period.

For a detailed discussion of the impact of corporate dissolution on products liability plaintiffs, see Henn & Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865 (1971).

11. Note, *supra* note 8, at 93. For a discussion of the bona fide purchaser rule with regard to real property transactions, see C. SMITH & R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 479-82 (1971).
12. Note, *supra* note 8, at 93-94.
13. See *supra* note 10.

assume the selling corporation's liability; (2) [w]hen the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) [w]hen the purchaser corporation is merely a continuation of the seller corporation; or (4) [w]hen the transaction is entered into fraudulently to escape liability for such obligations.¹⁴

The first exception, express or implied assumption of the selling corporation's liabilities, is fairly straightforward. The purchasing corporation will normally assume certain liabilities necessary to the uninterrupted conduct of the business. For example, existing contracts of the selling corporation are often expressly assumed.¹⁵ Unwanted or contingent liabilities, such as liability for defectively manufactured products, are often avoided through a clause in the sales contract expressly denying responsibility for all liabilities not expressly assumed in the contract.¹⁶ Because of the acquiring corporation's ability to assume only the liabilities advantageous to the uninterrupted continuation of the business, the express or implied assumption exception is ordinarily of little help to persons injured by defective products seeking compensation from the successor corporation.

Likewise, the fraud exception ordinarily does little to ease the product liability plaintiff's plight. The fraud exception has been used to impose liability on a successor corporation where the consideration given for the assets was fictitious or inadequate.¹⁷ Also, where the transfer was effected for the purpose of cheating creditors, the transferee has been held liable for the debts of the transferor.¹⁸ While this exception may be of some use in exceptional

14. *Jones v. Johnson Mach. and Press Co.*, 211 Neb. 724, 728, 320 N.W.2d 481, 483 (1982). See also 15 FLETCHER, *supra* note 7, at § 7122 nn.6-11.

15. See, e.g., *Bonee v. L & M Constr. Chem.*, 518 F. Supp. 375, 378 (M.D. Tenn. 1981) (buyer assumed seller's trade liabilities but did not assume future tort liability). See also Note, *supra* note 10, at 1311.

16. See, e.g., *Cyr v. B. Offen Co.*, 501 F.2d 1145, 1151 (1st Cir. 1974); *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 412, 244 N.W.2d 873, 875 (1976). Amsted Industries, Inc., the successor corporation in *Jones*, likewise assumed certain liabilities essential to the continued operation of the business, while expressly disclaiming all other liabilities. *Jones*, 211 Neb. at 726, 320 N.W.2d at 482. But see *Bouton v. Litton Industries, Inc.*, 423 F.2d 643, 652 (3d Cir. 1970), where a broad assumption of liabilities clause was construed to impliedly include assumption of the risk of products liability claims.

17. 15 FLETCHER, *supra* note 7, at § 7125. See, e.g., *Economy Ref. & Serv. Co. v. Royal Nat'l Bank*, 20 Cal. App. 3d 434, 97 Cal. Rptr. 706 (1971) (transfer not supported by consideration found to be fraud upon creditor despite trial court finding lack of fraudulent intent); *Ingram v. Prairie Block Coal Co.*, 319 Mo. 644, 5 S.W.2d 413 (1928) (liability imposed on successor upon finding that stated consideration of \$125,000 was never paid).

18. *United States v. Plastic Electro-Finishing Corp.*, 313 F. Supp. 330 (1970) (tax deficiency; creditor was the United States government). See also 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 324 (rev. ed. 1940).

cases, presumably, most assets sales are not entered into fraudulently.

The exceptions most frequently used by plaintiffs to attempt to impose liability for defective products upon a successor corporation in an assets acquisition transaction are the mere continuation and de facto merger exceptions. Some courts have expanded these exceptions in providing relief to persons injured by defective products who have been deprived of a remedy due to the dissolution of the original manufacturing entity. The treatment of these two exceptions is often similar, thus, the distinction between them is difficult to perceive.

B. Expansion of the De Facto Merger Doctrine

The de facto merger exception was used originally in the area of shareholder voting and appraisal rights.¹⁹ If a corporate transaction is a statutory merger, a majority of the shareholders of both of the involved corporations must approve the plan.²⁰ If a transaction is considered a sale of corporate assets, only a majority of the shareholders of the transferor corporation need approve the sale.²¹ Similarly, in the case of a statutory merger, the dissenting shareholders of both corporations may exercise appraisal rights, while in the case of an assets acquisition, only the dissenting shareholders of the transferor corporation may exercise appraisal rights.²² The de facto merger exception, as originally formulated, was intended to protect the interests of shareholders²³ in corporate com-

19. *Ramirez v. Amsted Industries Inc.*, 86 N.J. 332, 341-42, 431 A.2d 811, 816 (1981). See Note, *Products Liability: Developments in the Rule of Successor Liability for Product-Related Injuries*, 12 U. MICH. J.L. REF. 338, 352 (1979) [hereinafter cited as *Products Liability*].

20. See, e.g., MODEL BUSINESS CORP. ACT § 73 (rev. ed. 1979). Variations of this provision are collected in MODEL BUSINESS CORP. ACT ANN. 2D § 73, ¶ 6 (Supp. 1977). Nebraska requires the approval of two-thirds of the shareholders of each corporation. NEB. REV. STAT. § 21-2072 (1977).

21. See, e.g., MODEL BUSINESS CORP. ACT §§ 78-79 (rev. ed. 1979). Individual state variations of this provision are collected in MODEL BUSINESS CORP. ACT ANN. 2D § 78, ¶ 6, § 79, ¶ 6 (Supp. 1977). Nebraska requires the approval of two-thirds of the shareholders of the selling corporation if the sale does not take place in the regular course of business. NEB. REV. STAT. § 21-2078 (1977).

22. See, e.g., MODEL BUSINESS CORP. ACT §§ 80-81 (rev. ed. 1979). Individual state statutes are collected in MODEL BUSINESS CORP. ACT ANN. 2D § 80, ¶ 6, § 81, ¶ 6 (1977 Supp.). Despite some procedural differences, Nebraska's approach to the shareholders' right to dissent operates in essentially the same manner as that of the Model Act. See NEB. REV. STAT. §§ 21-2005, -2079 to -2080 (1977).

23. Some older cases mentioned the de facto merger doctrine in connection with creditors' rights as opposed to stockholders' rights. The discussions in these cases are generally confusing. See, e.g., *City of Altoona v. Richardson Gas & Oil Co.*, 81 Kan. 717, 106 P. 1025 (1910) (imposing liability for gas contracts on the successor in a sale of assets for stock transaction where the transferor

binations which, though in form are sales of assets, are in substance mergers.²⁴

Only recently have courts begun to delineate factors germane to a finding of a de facto merger in suits seeking to impose product liability on the successor corporation. In statutory mergers, one corporation absorbs another, and the shareholders of the dissolving corporation receive shares in the surviving corporation in exchange for the shares they previously owned.²⁵ Thus, the essential characteristics of a de facto merger have become continuity of shareholder interest between the selling corporation and the buying corporation, and prompt dissolution of the selling corporation.²⁶

The requirement that the selling corporation dissolve promptly

becomes practically extinct, despite the fact that the transferor continued to exist and was available for suit); *Pankey v. Hot Springs Nat'l Bank*, 46 N.M. 10, 119 P.2d 636 (1941) (No de facto merger was found because the transaction in question was not accomplished in accordance with the federal statutes governing consolidation of national banks. Had the transfer been in accordance with the national bank consolidation statutes, it would have constituted a statutory merger, and there would have been no reason to inquire into whether the transaction amounted to a de facto merger.).

24. See *Farris v. Glen Alden Corp.*, 393 Pa. 427, 143 A.2d 25 (1958) (the leading case), in which the court stated that mere reading of the provisions of the sale agreement is insufficient. Rather, to determine whether the transaction is a de facto merger, the consequences of the transaction should be scrutinized. *Id.* at 432, 143 A.2d at 28. See also *Rath v. Rath Packing Co.*, 257 Iowa 1277, 136 N.W.2d 410 (1965); *Applestein v. United Board & Carton Corp.*, 60 N.J. Super. 333, 159 A.2d 146 (Ch. Div. 1960); but see *Hariton v. Arco Elec., Inc.*, 41 Del. Ch. 74, 188 A.2d 123 (1963) (rejected the de facto merger doctrine on the basis of the Delaware corporations statutes).

25. See *supra* note 8.

26. See, e.g., *Bazan v. Kux Mach. Co.*, 358 F. Supp. 1250, 1252 (E.D. Wisc. 1973) (applying Wisconsin law) (cash consideration; seller continued to exist for ten months after sale); *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817, 821 (D. Colo. 1968) (applying California law) (no de facto merger where the sale of assets was for cash, and the seller continued to exist eleven months after the sale). The court in *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797 (W.D. Mich. 1974) (applying New Jersey law), summarized the characteristics of a de facto merger as found in the leading New Jersey case, *McKee v. Harris Seybold Co.*, 109 N.J. Super. 555, 264 A.2d 98 (Law Div. 1970), *aff'd*, 118 N.J. Super. 480, 288 A.2d 585 (App. Div. 1972), *rev'd*, 86 N.J. 332, 431 A.2d 811 (1981):

(1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.

(2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.

(3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

(4) The purchasing corporation assumes those liabilities and obli-

upon the transfer of its assets was disregarded in *Knapp v. North American Rockwell Corp.*,²⁷ thereby expanding the scope of the de facto merger exception. In *Knapp*, an employee of Mrs. Smith's Pie Company was injured when his hand was caught in a Packomatic machine manufactured by Textile Machine Works (TMW).²⁸ TMW had entered into an agreement with Rockwell under which it had transferred substantially all of its assets to Rockwell in exchange for Rockwell stock, and had agreed to dissolve as soon as the Rockwell stock had been distributed to its shareholders.²⁹ However, TMW remained in existence for a full eighteen months after its assets were transferred to Rockwell.³⁰

After noting that no prior cases decided under Pennsylvania law had addressed the problem, and after a discussion of cases from other jurisdictions which had failed to find a de facto merger because of the continued existence of the selling corporation, the court stated that "questions of an injured party's right to seek recovery are to be resolved by an analysis of public policy considerations rather than by a mere procrustean application of formalities"³¹ The court observed that if Rockwell was not held liable, Knapp would be left without a remedy,³² and that although neither Knapp nor Rockwell were in a position to avoid the accident, Rockwell was in a better position to spread the burden of the loss, either through insurance or an adjustment in the price of its products.³³ Thus, although TMW continued to exist for a substantial period of time following the transfer of its assets to Rockwell, the court found that the "better reasoned result would be to conclude that, for the purposes of determining liability to tortiously injured parties, the Rockwell-TMW transaction should be treated as a merger"³⁴

Although the *Knapp* decision relied on the traditional corporate rule and its exceptions, it represents a departure from the line of cases which merely applied the rule to the transaction in order to determine liability. By analyzing the rule in terms of the policies underlying strict products liability, the Third Circuit Court of

gations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Shannon v. Samuel Langston Co., 379 F. Supp. at 801.

27. 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) (applying Pennsylvania law).

28. *Id.* at 362.

29. *Id.* at 363.

30. *Id.*

31. *Id.* at 369.

32. *Id.* at 368.

33. *Id.* at 369-70.

34. *Id.* at 367.

Appeals set the stage for a reevaluation of the law of successor corporation liability for defective products.

C. Expansion of the Mere Continuation Exception

The requirements for finding that a purchasing corporation is a mere continuation of its predecessor are not well defined. Some courts have stated that a finding of mere continuation is not permissible unless there is continuity of officers, directors, management, shareholders, and business operations.³⁵ Second, these courts generally require that the seller have dissolved as soon as possible after the transfer. It also appears that a corporation which finds its origination in a reincorporation of an existing entity, or in an amendment of an existing corporate charter, will be liable as a mere continuation of the predecessor.³⁶ From these observations, it appears that, at least until recently, a corporation must have been materially identical to its predecessor in order to have been subjected to the liabilities of the predecessor under the mere continuation exception.³⁷

Like the de facto merger doctrine, the mere continuation exception has undergone considerable expansion. In *Cyr v. B. Offen & Co.*³⁸ the plaintiff was severely burned while cleaning the rollers of a printing press from inside a drying oven. The defective press and oven were manufactured by B. Offen Company, a sole proprietorship owned by Bernard Offen.³⁹ Upon Offen's death, the employees of the company, together with an outside financier, purchased the entire company from the estate.⁴⁰ Applying New Hampshire

35. *Lopata v. Bemis Co.*, 383 F. Supp. 342 (E.D. Pa. 1974) (applying Pennsylvania law); *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817, 821 (D. Colo. 1968) (applying California law); *McKee v. Harris Seybold Co.*, 109 N.J. Super. 555, 570, 264 A.2d 89, 107 (Law Div. 1970), *aff'd* 118 N.J. Super. 480, 288 A.2d 585 (App. Div. 1972), *rev'd*, 86 N.J. 332, 431 A.2d 811 (1981).

36. *See Comstock v. Great Lakes Distrib. Co.*, 209 Kan. 306, 312, 496 P.2d 1308, 1312 (1972).

37. For a general discussion of the mere continuation exception and a collection of cases dealing with it, see 15 FLETCHER, *supra* note 7, at § 7329.

38. 501 F.2d 1145 (1st Cir. 1974).

39. *Id.* at 1151.

40. *Id.* The court found important the fact that the purchase agreement obligated the newly formed corporation to: "(i) cause the Offen business to be operated continuously . . . (ii) cause the Offen business to be operated substantially in accordance with the same business practices and policies as are being employed by Offen at the date of agreement." *Id.* The court also noted that the purchase of goodwill and contract obligations was central to the agreement, that the newly formed purchaser assumed old service obligations, that no notice of the purchase was given to known customers, that the same products continued to be manufactured in the same way, and that B. Offen & Company, the purchaser, claimed in its advertising that it was a 40-year-old business. *Id.*

law, which had not previously dealt with successor corporation liability for the defective products of the predecessor, the court held that the successor could be held liable as a mere continuation of the seller despite the fact that there was no continuity of ownership.⁴¹

After stating that the traditional corporate rule and its exceptions were designed to control business debts and liabilities rather than the tort liability of manufacturers for defective products, the court went on to analyze the situation in the framework of the policies underlying strict tort liability. The court stated:

The very existence of strict liability for manufacturers implies a basic judgment that the hazards of predicting and insuring for risk from defective products are better borne by the manufacturer than by the consumer. The manufacturer's successor, carrying over the experience and expertise of the manufacturer, is likewise in a better position than the consumer to gauge the risks and the costs of meeting them. The successor knows the product, is as able to calculate the risk of defects as the predecessor, is in position to insure therefor and reflect such cost in sale negotiations, and is the only entity capable of improving the quality of the product.⁴²

The court concluded that the evidence of continuity provided by the purchase contract and B. Offen & Company's outward representations to its customers, coupled with the underlying policy rationale of strict liability, mandated a finding that B. Offen & Company was merely a continuation of its predecessor and should be held liable for its predecessor's defective products.

D. *Turner* and *Ray*: Abandonment of the Traditional Rule for Products Liability Claimants

Although the courts in *Knapp* and *Cyr* employed strict liability policy analyses in deciding to impose liability on successor corporations for the defective products of their predecessors, they did so within the framework of the traditional exceptions to the corporate rule of non-liability. Recently, two state courts have held that the rights of plaintiffs in product liability suits involving successor corporations should be determined by reference to the policies under-

41. *Id.* at 1154. The *Cyr* court cited cases holding that commonality of ownership is essential to a finding of continuation, (citing *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817 (D. Colo. 1968); *Bergman & Lefkow Ins. Agency & Co. v. Flash Cab Co.*, 110 Ill. App. 2d 415, 249 N.E.2d 729 (1969)), but stated that the ownership of the entity should not control where the same employees continue to produce the same products in the same plant, with the same supervision. 501 F.2d at 1152-54.

42. *Id.* at 1154. The court also noted that although the successor is not the entity which placed the product in the channels of commerce, thereby representing its safety to the public, the successor was profiting by its predecessor's representations through the goodwill it purchased, and through its outward representations of continuity. *Id.* See *supra* note 40.

lying strict liability without regard to the formalities of corporate law. Although the reasoning of the two cases is different in some substantial respects, the underlying assumption in both cases—that the rights of an injured party should not be governed by the form of a transaction to which the party was not privy—represents a departure from the method of analysis ordinarily applied by courts in this area.

The first case to abrogate the traditional rule in the area of successor corporation liability for defective products was *Turner v. Bituminous Casualty Co.*⁴³ In *Turner*, both of the plaintiff's hands were severed by a power press manufactured by the T.W. & C.B. Sheridan Company (Old Sheridan). Four years prior to the injury, Old Sheridan sold its entire business (including name, goodwill, and assets) for cash to a wholly owned subsidiary of Harris-Intertype Corporation, which incorporated under the name of T.W. & C.B. Sheridan Company (New Sheridan). Although New Sheridan expressly assumed certain of Old Sheridan's liabilities, it did not assume any liabilities not on the balance sheet of Old Sheridan as of the selling date. New Sheridan later merged with its parent company, Harris-Intertype Corporation. Turner appealed, following summary judgment for Harris in the initial trial.⁴⁴

After noting that the traditional corporate rule of non-liability and its exceptions arose in the areas of creditor protection, tax assessments, and shareholder's rights, and, as such, are generally unresponsive to the claims of products liability plaintiffs, the court analyzed the significance of the characterization of the corporate transaction from the standpoints of the injured party and the corporate transferee.⁴⁵ The court stated that "[t]o the injured person the problem of recovery is substantially the same, no matter what corporate process led to transfer of the first corporation and/or its assets."⁴⁶ Second, the court found the characterization of the transaction irrelevant to the corporate transferee, as long as both the seller and the buyer can determine exactly what is being transferred in order to establish an appropriate price. After observing

43. 397 Mich. 406, 244 N.W.2d 873 (1976). There is apparently some confusion as to whether the *Turner* court created a new exception to the traditional rule of non-liability, or simply expanded the mere continuation exceptions. See *infra* note 51.

44. These facts are taken from the Michigan Supreme Court's opinion. 397 Mich. at 411-13, 244 N.W.2d at 875-76.

45. *Id.* at 418-19, 244 N.W.2d at 878.

46. *Id.* at 419, 244 N.W.2d at 878. The court observed that regardless of whether the transaction took the form of a traditional statutory merger, a de facto merger in which one corporation paid for the assets of another with its own stock, or a sale of assets for cash, the injured party had no place to seek relief other than the transferee corporation.

that there would be no question of Harris' liability under the de facto merger exception had the consideration for the Sheridan-Harris transaction been stock rather than cash, the court stated that it could discern no logical reason to treat the two types of transactions differently.⁴⁷

Following a discussion of two cases which had imposed liability on successor corporations on the basis of continuity between the transferor and transferee entities,⁴⁸ the *Turner* court accepted the defendant's assertion that business reality required New Sheridan to be as much as possible like Old Sheridan in order to exploit the goodwill purchased from Old Sheridan.⁴⁹ The court, however, found this to be a strong indication of continuity. Accordingly, continuity of the two business concerns was sufficient to impose liability for defective products on the successor: "Justice would be offended if a corporation which holds itself out as a particular company for the purpose of sales, would not be estopped from denying that it is that company for the purpose of determining products liability."⁵⁰

Turner premised successor liability for a defective product on the enterprise continuity between transferor and transferee. A second new exception⁵¹ to the traditional rule of non-liability in a

47. *Id.* at 423, 244 N.W.2d at 880. The *Turner* court did not ignore the fact that a major distinction between a sale of assets for stock and a sale of assets for cash is that in the former, commonality of ownership is provided by the exchange of stock. It recognized that the presence of stock as consideration is evidence of a sufficient nexus between the seller and buyer to impose liability. However, as the court observed, the consideration in a stock for assets transaction is frequently a mixed bag of stock and cash, so that the actual commonality of ownership is minimal. Thus, the absence of an exchange of stock should not be conclusive. *Id.*

48. The *Turner* court discussed *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974), and *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797 (W.D. Mich. 1974). For a discussion of *Cyr*, see *supra* notes 38-42 and accompanying text. The *Shannon* test for a de facto merger is quoted *supra* in note 26.

49. *Turner*, 397 Mich. at 426, 244 N.W.2d at 882.

50. *Id.* The court adopted the first, third, and fourth criteria from the test set out in *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797 (W.D. Mich. 1974), as guidelines to establish sufficient continuity to impose liability for the predecessor's defective products. *Turner*, 397 Mich. at 426, 244 N.W.2d at 882. See *supra* note 26.

51. At least one court has characterized the *Turner* approach as simply an expansion of the mere continuation exception. *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811 (1981). This reading of *Turner* seems too narrow. Although the *Turner* court adopted parts of the traditional test for a de facto merger as guidelines in establishing continuity of interest, see *supra* note 50, the court also recognized that a satisfactory result can only be reached when the problem is correctly treated as a products liability case and is decided on products liability principles rather than simply reexamining and readjusting corporate law principles. *Turner*, 397 Mich. at 423, 244 N.W.2d at 880. Addi-

sale of assets transaction has developed in the Supreme Court of California. The exception created in *Ray v. Alad Corp.*,⁵² however, is based on continuation of the product line rather than enterprise continuity.

In *Ray*, the plaintiff was injured when he fell from a defective ladder manufactured by the Alad Corporation (Alad I). Approximately nine months prior to the injury, Alad I had sold its entire business, including stock in trade, trade names, and goodwill, to Lighting Maintenance Corporation for cash. As was contemplated by the sale contract, Alad I promptly dissolved following completion of the sale. Lighting Maintenance Corporation then reincorporated as Alad Corporation (Alad II). Alad II assumed certain of Alad I's liabilities and promised to fill its uncompleted orders, but no mention was made in the sales contract of liability for defectively manufactured products. Following the purchase by Alad II, the same product lines were manufactured in the same plant, by the same people, according to the same plans. Additionally, the Alad name was used on all ladders manufactured by the new company. With the exception of redesigning the logo, Alad II gave no outward indication of the change of ownership.⁵³

The action in *Ray* had been dismissed by the trial court on defendant's motion for summary judgment based on the traditional rule of non-liability in asset sales transactions. The court of appeals reversed the trial court due to the continuity between Alad I and Alad II,⁵⁴ a rationale very similar to the approach taken in *Turner*.⁵⁵ The California Supreme Court, however, declined to follow the opinion of the court of appeals. Concluding that liability could not be imposed on Alad II under the exceptions to the traditional rule applied by the trial court,⁵⁶ and declining to expand those exceptions,⁵⁷ the Court created an additional exception to the traditional rule for cases involving product liability claims.⁵⁸

tionally, the holding in *Turner* was at least partially based on an estoppel theory. See *supra* text accompanying note 50. Thus, although the court in *Turner* spoke in terms of continuation and continuity of interest, the opinion still represents a significant departure from the continuation exception, even as expanded by *Cyr*.

52. 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

53. *Id.* at 28, 560 P.2d at 6, 136 Cal. Rptr. at 577.

54. *Ray v. Alad Corp.*, 55 Cal. App. 3d 855, 127 Cal. Rptr. 817 (1976).

55. See *supra* notes 43-51 and accompanying text.

56. *Ray v. Alad Corp.*, 19 Cal. 3d 22, 28, 560 P.2d 3, 7, 136 Cal. Rptr. 574, 578 (1977).

57. *Id.* at 30, 560 P.2d at 8, 136 Cal. Rptr. at 579. Although referring to *Cyr*, see *supra* notes 38-42 and accompanying text, as helpful authority, the *Ray* court disagreed with the approach taken in *Cyr*, whereby a generally recognized exception to the general rule of non-liability was expanded in order to accommodate the interests of product liability plaintiffs.

58. 19 Cal. 3d at 34, 560 P.2d at 11, 135 Cal. Rptr. at 582. The court held: "[A] party

Following a discussion of California strict liability cases and policies,⁵⁹ the court advanced the following justifications for imposing strict liability upon a manufacturer's successor:

- (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.⁶⁰

Applying these policies, the *Ray* court found that the plaintiff's remedies against Alad I were destroyed by its dissolution. Additionally, the court found that Alad II was as able to insure against the risks of defective products and spread that cost throughout society by adjustments in the price of its products, as Alad I. Finally, the court found it fair to impose liability on Alad II because of its "deliberate albeit legitimate exploitation of Alad I's established reputation as a going concern manufacturing a specific product line"⁶¹ Imposition of liability on successor manufacturers was found to have the salutary effect of avoiding windfalls to the predecessor through enhanced purchase prices not reflecting the costs of liability for defective products.⁶²

That there is no uniformly agreed upon approach to the problem of successor liability for defectively manufactured products is demonstrated by the previous discussion. Clearly, courts have been struggling to articulate an approach which balances the policies of strict products liability theory with the traditional law of corporations. Prior to 1974, every successor product liability problem was analyzed according to the traditional rule of non-liability and its generally recognized exceptions. Although analysis under the traditional rule continues,⁶³ a number of courts have attempted

which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the product line previously manufactured and distributed by the entity from which the business was acquired." *Id.* Thus, contrary to the approaches taken by the *Turner* court and the court of appeals in *Ray*, liability under the new exception is premised on continuity of the product line rather than continuity of the entire enterprise.

59. The court discussed *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697, (1963); and *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). These cases are fairly characterized as the seminal cases in the area of strict tort liability theory.

60. *Ray v. Alad Corp.*, 19 Cal. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580.

61. *Id.* at 34, 560 P.2d at 10, 136 Cal. Rptr. at 581.

62. *Id.*

63. See, e.g., *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977); *Domine v. Fulton Iron Works*, 76 Ill.

to lessen the burden of persons injured by the defective product of a defunct manufacturer. This has been accomplished through either expansion of the traditional exceptions,⁶⁴ or creation of entirely new exceptions.⁶⁵

III. APPLICATION AND ANALYSIS: DECISIONS DEALING WITH PRODUCTS LIABILITY ENGENDERED BY THE JOHNSON MACHINE AND PRESS CORPORATE HISTORY

A. Cases Decided Prior to *Jones*

With the background painted, this Note will now analyze the competing concerns of these varied approaches to solving the successor liability problem within the confines of a given fact situation. The same corporate transaction involved in *Jones* has been analyzed by a number of different courts. Noticeably, the legal principles applied and the conclusions reached have been anything but consistent. However, with some slight exceptions, *e.g.*, time of purchase of the press, press model, etc., the cases involving the Johnson-Bontrager-Amsted assets sale presented identical fact situations.

Johnson Machine and Press Company was a manufacturing concern engaged in the production of power presses.⁶⁶ In 1956, all assets and liabilities of Johnson were transferred to the Bontrager Corporation in exchange for Bontrager common stock. Johnson became a wholly owned subsidiary of Bontrager, but engaged in no corporate activities, and owned no assets other than trade names. Bontrager continued to manufacture presses under the Johnson trade name until August 31, 1962.

On August 20, 1962, Amsted Industries purchased all of Bon-

App. 3d 253, 395 N.E.2d 19 (1979). See also the discussions of *Hernandez v. Johnson Press Corp.*, 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979), *infra* notes 80-86 and accompanying text; and *Jones v. Johnson Mach. and Press Co.*, 211 Neb. 724, 320 N.W.2d 481 (1982), *infra* notes 99-120 and accompanying text.

64. See *Knapp v. N. Am. Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974), *supra* notes 27-34 and accompanying text; and *Cyr v. B. Offen and Co.*, 501 F.2d 1145 (1st Cir. 1974), *supra* notes 38-42 and accompanying text.

65. See the discussions of *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976), *supra* notes 43-51 and accompanying text; and *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977), *supra* notes 52-62 and accompanying text.

66. The facts presented here are taken from *Jones v. Johnson Mach. and Press Co.*, 211 Neb. 724, 320 N.W.2d 481 (1982). The same set of facts will be used in the analysis of all of the cases involving this corporate transaction. Notation will be made, however, where the findings of fact of the various courts conflict with the facts as stated by the Nebraska Supreme Court.

trager's assets for cash. The sole remaining share of Johnson stock was included in this transfer. In the sale contract between Amsted and Bontrager, Amsted had agreed to assume certain liabilities of Bontrager, but these did not include liability for defective products manufactured by Johnson or Bontrager. Indeed, the contract provided that all machines manufactured prior to the sale were the sole responsibility of Bontrager. Bontrager and its shareholders also agreed not to compete with Amsted for five years. Two days after the purchase of Bontrager, Amsted assigned all its rights under the contract to its wholly owned subsidiary, South Bend Lathe, Incorporated. South Bend Lathe began to manufacture presses at the original plant, under the Johnson trade name, in September of 1962.

Bontrager was dissolved and its remaining assets distributed to its shareholders in 1964. Approximately one year later, Amsted dissolved Johnson, and as its sole shareholder received its assets, which consisted solely of trade names. In 1965, South Bend Lathe was also dissolved by Amsted. However, with the exception of a change of plants, South Bend Lathe continued to use the same equipment to manufacture presses under the Johnson trademark, as an unincorporated division of Amsted. In 1975, Amsted sold its South Bend Lathe division to LWE, Incorporated, which then reincorporated as South Bend Lathe, Incorporated, and continued to manufacture Johnson presses.⁶⁷

The first reported decision⁶⁸ dealing with the Johnson-Bon-

67. In *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811 (1981), the court found that the sale contract between Amsted and South Bend contained an indemnification agreement whereby Amsted agreed to indemnify South Bend for any losses arising out of machinery manufactured and sold prior to the closing date. Amsted thus acknowledged that it would be responsible for defending suits and for any liability arising out of defects in the Johnson product lines. *Id.* at 340, 431 A.2d at 815. The Nebraska Supreme Court did not mention an indemnification agreement in its opinion. The appellant's brief submitted to the Nebraska Supreme Court asserted that South Bend Lathe, by letter to appellant's counsel, stated that when Amsted sold South Bend Lathe, Amsted agreed to assume responsibility for liabilities prior to the date of sale in June of 1975. Brief for the Appellant at 12, *Jones*, 211 Neb. 724, 320 N.W.2d 481 (1982). Additionally, while the appellee's brief requested the Nebraska Supreme Court to affirm the summary judgments as to both Amsted and South Bend Lathe, their briefed arguments were directed almost solely towards Amsted's potential liability. It remains unclear why no mention of the indemnification agreement was made. Because the Nebraska Supreme Court affirmed the summary judgments in favor of both Amsted and South Bend Lathe, it is not clear whether one of the parties or both of them would have been liable had the case been decided differently.

68. One unreported case involving the Johnson-Bontrager-Amsted transactions has been found. In *Poole v. Amstead [sic] Indus., Inc.*, No. CIV-1-76-75 (E.D. Tenn. 1976), *aff'd*, 575 F.2d 1338 (1978), the district court granted Amsted's motion for summary judgment. On appeal, in an unreported per curiam opin-

trager-Amsted transfers and their effect on liability for defective products was *Ortiz v. South Bend Lathe*.⁶⁹ In *Ortiz*, the allegedly defective press had been manufactured by Johnson and sold through Johnson's distributor, Meyer Sheet Metal Machinery Company, to the plaintiff's employer in 1955. Applying the traditional rule of non-liability in a cash-for-assets transaction, the *Ortiz* court held that liability could not be imposed on Amsted for products defectively manufactured by its predecessors.⁷⁰

The *Ortiz* opinion was accompanied by a forceful dissent by Justice Fleming.⁷¹ Conceding that several corporate transfers had occurred between the time of the manufacture of the press and the injury, he noted that an outward showing of business continuity had been maintained throughout the transfers. He found this continuity to be sufficient to place liability for Johnson's defectively manufactured products on Amsted.⁷²

The next case involving Amsted's liability for presses defectively manufactured by Johnson was *Korzetz v. Amsted Industries, Inc.*⁷³ Applying Michigan law,⁷⁴ the court analyzed the Amsted

ion, the 6th Circuit Court of Appeals affirmed. However, the court noted that the plaintiff had failed to allege that the original manufacturer (Bontrager) had dissolved, or that it was without sufficient assets to satisfy claims. Because of the apparent inadequacy of the plaintiff's pleading, the case was not presented to the 6th Circuit in an acceptable posture, and it will not be further discussed here.

69. 46 Cal. App. 3d 842, 120 Cal. Rptr. 556 (1975). *Ortiz* was expressly overruled by *Ray v. Alad Corp.*, 19 Cal. 3d 22, 34, 560 P.2d 3, 10, 136 Cal. Rptr. 574, 582 (1977). See *supra* notes 52-62 and accompanying text.

70. Under California law the plaintiff was allowed to recover from Johnson's distributor, Meyer. The *Ortiz* court was thus faced with the claim of a member of the original chain of distribution for indemnification by the successor to the original manufacturer. For general discussions of the imposition of strict products liability on members of the chain of distribution, see Carmichael, *Strict Liability in Tort—An Explosion in Products Liability Law*, 20 DRAKE L. REV. 528, 556-62 (1971); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 814-15 (1966).

Because of a Nebraska statute allowing product liability suits to be brought only against the manufacturer, the plaintiff in *Ortiz* would have been left with no remedy at all under the traditional rule of non-liability in Nebraska. See *infra* text accompanying note 114.

71. *Ortiz*, 46 Cal. App. 3d at 850, 120 Cal. Rptr. at 560.

72. In an oft-quoted passage, Justice Fleming colorfully outlined his position:

Product liability today has become an integral part of a manufacturing business, and the liability attaches to the business like fleas to a dog, where it remains imbedded regardless of changes in ownership of the business. So long as the business retains its distinctive identity and character and continues to be operated as it has in the past, defective product liability adheres to the business and remains there until discharged by bankruptcy or comparable judicial act.

Id. at 851, 120 Cal. Rptr. at 561 (dissenting opinion).

73. 472 F. Supp. 136 (E.D. Mich. 1979).

74. *Id.* at 143.

corporate history and its effect on liability for Johnson's defectively manufactured presses under the approach espoused in *Turner*.⁷⁵ Applying the guidelines for determining continuity of interest set out in *Turner*,⁷⁶ the court found "strong and convincing evidence" of continuity.⁷⁷

Amsted asserted that the change in corporate name, and the fact that the intermediate purchase by Bontrager, in effect, twice removed Amsted from the original manufacturer, rebutted the evidence of enterprise continuity found by the court. Additionally, Amsted asserted that Bontrager's continued existence for over two years following the sale of its assets to Amsted precluded the imposition of liability on Amsted. The court, however, disagreed. It noted that *Turner* required only that the transferor eventually become defunct, a condition present in the instant case despite the fact of Bontrager's continued existence. The intermediate ownership by Bontrager was found to be legally insignificant because, despite that ownership, Amsted continued the business that Johnson established.⁷⁸ Finally, the court found that the change in corporate name, in reality, did little to rebut the previous finding of continuity of interest.⁷⁹ The court thus found that under the *Turner* rule of enterprise liability, Amsted could be held liable for the defectively manufactured products of its predecessors.

The reasoning most closely resembling that adopted by the Nebraska Supreme Court was set out in *Hernandez v. Johnson Press Corp.*⁸⁰ Applying the general corporate rule of non-liability in cash-for-assets acquisitions, the Appellate Court of Illinois held that Amsted was not liable for injuries caused by the defective products of its predecessors. The court found that under the generally recognized exceptions to the traditional rule, no de facto merger had occurred.⁸¹ Furthermore, on what has been character-

75. See the discussion of *Turner*, *supra* notes 43-51 and accompanying text.

76. See *supra* notes 26 & 50.

77. *Korzetz*, 472 F. Supp. at 144. This evidence included the following facts: Amsted purchased all of Bontrager's assets; sales representative contracts were to be maintained; and the real property which was transferred was to be used for continuing operations. Also, Bontrager's shareholders covenanted not to compete with Amsted for five years, and Amsted was to attempt to employ all of Bontrager's employees except three management level personnel.

78. *Id.* at 145.

79. "The Whole World' that actually or constructively searched the Indiana Secretary of State's Office may have been notified that the official corporate names 'Johnson' or 'Bontrager' were not continued by Amsted, but the world of the marketplace continued to see and rely upon the name 'Johnson Press.'" *Id.* at 144.

80. 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979).

81. The de facto merger doctrine as traditionally formulated requires substantial

ized as a shamefully weak record,⁸² the court could point to no facts indicating continuity of management, personnel, physical location, assets and general business operations.⁸³

The court also refused to apply *Ray*'s product line analysis to the Amsted transaction. Referring to an earlier Illinois appellate decision rejecting the *Ray* analysis,⁸⁴ the *Hernandez* court found certain factual distinctions significant.⁸⁵ Additionally, the court asserted that the product line analysis was not appropriate because "broad public policy issues are best handled by legislatures. . . ."⁸⁶

The *Ray* approach rejected in *Hernandez* was adopted two years later as the law of New Jersey in *Ramirez v. Amsted Industries, Inc.*⁸⁷ In *Ramirez*, the plaintiff was injured by a Johnson press manufactured by Johnson in 1948 or 1949. The trial court had

identity of ownership between the transferor and transferee entities, *i.e.*, the purchase of assets with the acquiring corporation's stock as consideration. See *supra* notes 19-26 and accompanying text. Amsted, however, purchased Bontrager's assets for cash.

82. *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 348, 431 A.2d 811, 819 (1981).

83. *Hernandez*, 70 Ill. App. 3d at 667, 388 N.E.2d at 780. Compare this finding to that of the *Korzetz* court, *supra* note 79.

84. *Johnson v. Marshall & Huschart Mach. Co.*, 66 Ill. App. 3d 766, 384 N.E.2d 141 (1978).

85. In *Ray*, there were no intermediate transfers, the plaintiff was injured nine months after the change of corporate ownership, and the transferor agreed to consult with and not compete against the transferee. The *Hernandez* court noted that Bontrager owned the Johnson business prior to Amsted, and that the injury complained of occurred 19 years after the original sale of the defective press. Additionally, the court found no evidence in the record of consultation or non-competition agreements. Based on the findings of other courts, these factual distinctions do not appear to be particularly compelling. See the discussions of *Korzetz*, *supra* notes 73-79 and accompanying text; and *Ramirez*, *infra* notes 87-98 and accompanying text. More importantly, perhaps, since *Ray* is firmly grounded in the underlying policies of strict products liability, it would seem that a better approach in determining whether or not to adopt that rationale would be to analyze those same policies rather than merely distinguish the cases on factual grounds.

86. *Hernandez*, 70 Ill. App. 3d at 670, 388 N.E.2d at 782 (quoting *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 441 (7th Cir. 1977)). The Illinois Appellate Court has recently reaffirmed its adherence to the traditional corporate rule and its exceptions. In *Manh Hung Nguyen v. Johnson Mach. and Press Co.*, 104 Ill. App. 3d 1141, 433 N.E.2d 1104 (1982), the court once again analyzed the Johnson corporate transactions with reference to the traditional rule, and found that Amsted could not be held liable under any of the exceptions. Noting that plaintiff's claim against the original manufacturer was destroyed by virtue of the corporate dissolution statute, the court suggested that the best solution to the problem would be to require dissolving corporations to maintain products liability insurance or to keep enough assets on hand to satisfy claims arising subsequent to dissolution. This solution, said the court, must be sought in the legislature rather than the courts.

87. 86 N.J. 332, 431 A.2d 811 (1981).

granted Amsted's motion for summary judgment on the basis of the traditional rule, but was reversed by the appellate division in an opinion essentially adopting the product line exception.⁸⁸ On appeal to the New Jersey Supreme Court, the plaintiff argued that Amsted could be held liable under the expanded mere continuation exception,⁸⁹ the continuity of enterprise approach,⁹⁰ or the product line exception.⁹¹ Following a discussion of the various approaches and their underlying rationales, the court concluded that the best reasoned mode of analysis was the product line exception.⁹²

Applying the *Ray* (product line) analysis to the Johnson-Bontrager-Amsted transactions, the court held that Amsted should be liable for its predecessor's defectively manufactured products. Despite Bontrager's briefly continued corporate existence following its sale of assets to Amsted, the court noted that the plaintiff's remedy was destroyed by the transactions, while the Johnson product line continued to be produced. Second, Amsted was better able to spread the cost of injuries through insurance than was the injured party. Finally, because Amsted enjoyed the use of Johnson's trade name and goodwill, and because it was able to purchase the assets of an established manufacturing enterprise, imposition of liability for Johnson's defectively manufactured presses seemed justified.⁹³

88. *Ramirez v. Amsted Industries, Inc.*, 171 N.J. Super. 261, 408 A.2d 818 (App. Div. 1979).

89. See *supra* notes 38-42 and accompanying text.

90. See *supra* notes 43-51 and accompanying text.

91. See *supra* notes 52-62 and accompanying text.

92. The court found the traditional rule, even as expanded by *Cyr*, to be "inconsistent with the developing principles of strict products liability and unresponsive to the interests of persons injured by defective products in the stream of commerce." *Ramirez*, 86 N.J. at 342, 431 A.2d at 816. Characterizing *Turner* as simply an expansion of the mere continuation exception, see *supra* note 51, the court noted the fundamental differences between the *Turner* and *Ray* approaches. While the *Turner* analysis hinges on continuity of management, personnel, physical location, assets, trade names, and general business operations, the *Ray* test looks past the composition of the corporate identity and focuses instead on "the successor's undertaking to manufacture essentially the same line of products as the predecessor." *Ramirez*, 86 N.J. at 347, 431 A.2d at 819. The court felt that in cases involving successor liability for defective products, the continued manufacturing operations should be emphasized rather than the commonality of ownership and management. *Id.*

93. 86 N.J. at 352-53, 431 A.2d at 822. The court stated:

Through acquisition of the Johnson tradename, plant, employees, manufacturing equipment, designs and customer lists, and by holding itself out to potential customers as the manufacturer of the same line of Johnson power presses, Amsted benefited substantially from the legitimate exploitation of the accumulated good will earned by the Johnson product line. Public policy requires that having received the substantial benefits of the continuing manufacturing enterprise, the successor corporation should also be made to bear the

Although some courts have downplayed arguments that imposition of liability for defective products in asset sales for cash will have a chilling effect on future transfers,⁹⁴ the *Ramirez* court acknowledged that abandonment of the traditional rule of non-liability may have some detrimental effect on the marketability of going business concerns. It found, however, that a reduction in the sale price of a business to reflect potential liability for previously defectively manufactured products is, "a more . . . accurate measure of the true worth of the business."⁹⁵ In addition to adjustments in the purchase price of a business, the acquiring entity may protect itself through purchase of products liability insurance,⁹⁶ full or partial indemnification agreements, or by requiring the seller to maintain an escrow account out of which product liability claims can be paid.⁹⁷ Thus, although the problems caused to business planners by abandonment of the old non-liability rule should not be ignored, the *Ramirez* court found that the social policy favoring imposition of the costs of injuries on the manufacturing enterprise outweighed the potential negative impact on the business community.⁹⁸

burden of the operating costs that other established businesses must ordinarily bear.

Id. (citation omitted).

94. See *Turner*, 397 Mich. at 428, 244 N.W.2d at 883.

95. *Ramirez*, 86 N.J. at 354, 431 A.2d at 822.

96. Admittedly, products liability insurance is frequently expensive, and occasionally impossible to obtain. For example, there was testimony in 1977 before the House Committee on Small Businesses that 21.6% of businesses seeking products liability insurance could not obtain it. *Products Liability Insurance: Survey Findings of the Subcomm. on Capital, Investment, and Business Opportunities of the House Comm. on Small Business*, 95th Cong., 1st Sess. 13177 (1977) (statement of Charles Whalen). Nevertheless, products liability insurance is available to most businesses, and the costs associated with it may be passed along to society as a whole through a corresponding increase in the price of the insured's business products. For a general discussion of the effects of insurance on the decision to impose products liability on corporate successors, see Comment, *Products Liability and Successor Corporations: Protecting the Product User and the Small Manufacturer Through Increased Availability of Products Liability Insurance*, 13 U.C.D. L. REV. 1000 (1980).

97. For an excellent discussion of precautions which can be taken by the acquiring entity in order to protect itself from the burden of unexpected liabilities upon the acquisition of another business, see Kadens, *Practitioner's Guide to Treatment of Seller's Products Liabilities in Assets Acquisitions*, 10 U. Tol. L. REV. 1 (1978). Professor Kadens takes a unique approach to the problem. Rather than discuss the propriety of imposing liability on a corporate successor in a sale of assets transaction, he merely assumes that because of the recent trend, a good chance of successor liability exists. He then outlines methods which can be used to minimize or insure against that liability.

98. The court was further convinced that "[i]n time, the risk-spreading and cost avoidance measures adverted to above should become a normal part of busi-

B. The Fifth Decision: *Jones v. Johnson Machine and Press Co.*

Fully cognizant of the emerging conflict with regard to corporate successor liability, and against the background of *Ortiz*, *Korzetz*, *Hernandez*, and *Ramirez*, the Nebraska Supreme Court faced for the first time, in *Jones*, the question of whether a corporation acquiring the assets of another concern for cash can be held liable for the defective products of the predecessor. The court chose to answer that question in the negative. In reaching the decision, the court did not employ an ornate analysis. Rather, the importance of the case to Nebraska practitioners lies not so much in the holding of the case itself, but in what the opinion of the court did not say.

Following a lengthy presentation of the corporate transactions which led to Amsted's ownership of the Johnson press enterprise,⁹⁹ the court cited several cases imposing liability on successor corporations.¹⁰⁰ The court noted the basic theory relied upon in each of those cases, but did not analyze any of them in depth.¹⁰¹ Recognizing that some courts had imposed liability on successor corporations for the injuries caused by products defectively manufactured by their predecessors, the court nevertheless declared that "under the facts in the present case we find no basic justification for a departure from the traditional rules."¹⁰²

The court then stated that the policy considerations underlying the usual application of strict liability "do not necessarily apply equally to successor corporations."¹⁰³ Unfortunately, the court failed to articulate what it considers those policies to be, and why they do not apply to corporate successor liability. It seems somewhat incongruous that courts imposing liability on successor corporations have premised their decisions squarely upon the

ness planning in connection with the corporate acquisition of the assets of a manufacturing enterprise." *Ramirez*, 86 N.J. at 354-55, 431 A.2d at 823.

99. See *supra* notes 66-67 and accompanying text.

100. The court cited the superior court opinion in *Ramirez v. Amsted Industries, Inc.*, 171 N.J. Super. 261, 408 A.2d 818 (App. Div. 1979); *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797 (W.D. Mich. 1974); *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976), see *supra* notes 43-51 and accompanying text; and *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977), see *supra* notes 52-62 and accompanying text. The court also cited *Dawejko v. Jorgenson Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (Super. Ct. 1981), a case in which the Superior Court of Pennsylvania adopted *Ray's* product line exception. The reasoning of the *Dawejko* court is very similar to that set forth in *Ramirez*, *supra* notes 87-98 and accompanying text.

101. The court's discussion of the cases cited in note 100, *supra*, took up slightly less than one-half page of the opinion.

102. *Jones v. Johnson Mach. and Press Co.*, 211 Neb. at 729, 320 N.W.2d at 484.

103. *Id.*

underlying rationales of strict products liability, while the Nebraska court found that those policies do not apply to successors.

To date, the Nebraska court has failed to clearly articulate the doctrinal rationale it embraces in strict liability cases.¹⁰⁴ The doctrine of strict liability for defective products was adopted as the law of Nebraska in *Kohler v. Ford Motor Co.*¹⁰⁵ In *Kohler*, however, the court did not discuss the rationale for adopting strict liability. Instead, it referred readers to a number of prior cases and commentaries.¹⁰⁶ Although the references cited by the court discuss the various policy justifications in various ways, comment c to section 402A of the *Restatement (Second) of Torts*¹⁰⁷ seems fairly representative of the Nebraska Supreme Court's view of strict liability for defective products, at least until *Jones*.

But in *Jones* the court stated:

[T]he corporate assets purchaser, as a successor of the manufacturer of a defective product, cannot be said to have created the risk of a product manufactured by its predecessor, and, except in a very remote way, does not realize the profit for the sale of a predecessor's product. Generally speaking, the successor corporation has neither invited use of its predecessor's product nor represented to the public that that product is safe and suitable for use.¹⁰⁸

104. An extensive discussion of past Nebraska products liability cases is beyond the scope of this note. This conclusion, however, is supported by other writers. See, e.g., Comment, *Strict Tort Liability in Nebraska: Recent Developments in Perspective*, 12 CREIGHTON L. REV. 370 (1978); Note, *Friedrich II: Nebraska Takes a Closer Look at Automobile Design Defect*, Hancock v. Pac-car, Inc., 204 Neb. 468, 283 N.W.2d 25 (1979), 59 NEB. L. REV. 538, 540-41 (1980).

105. 187 Neb. 428, 191 N.W.2d 601 (1971).

106. The court in *Kohler* cited *Greenman v. Yuba Power Prod., Inc.*, 50 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697, (1963); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); RESTATEMENT (SECOND) OF TORTS § 402A (1965); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). Additionally, the court alluded to Justice Traynor's concurrence in *Escala v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944).

107. On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, that in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

RESTATEMENT (SECOND) OF TORTS § 402A comment C (1965).

108. *Jones*, 211 Neb. at 729-30, 320 N.W.2d at 484 (emphasis added).

While it is true that the successor in *Jones* did not place the defective product on the market, or realize a profit from the sale of that particular item, other courts have characterized the benefit received by the successor in its purchase of the entire operation of its predecessor in substantially stronger terms than remote,¹⁰⁹ and a broader view of the benefits received by the successor is surely consistent with the *Restatement* position. Indeed, the very reason for purchasing the entire operation of another corporation rather than just the physical facilities is to allow the successor to exploit the accumulated goodwill and reputation of the predecessor.¹¹⁰ In fact, failure to impose liability on the successor leads to a windfall for both the predecessor and the successor. The seller receives an enhanced price for its enterprise which does not reflect the costs to society of the injuries caused by its defective products, and the buyer receives the benefits of an established business concern without inheriting the products liability which would normally be attached to that enterprise.¹¹¹ Likewise, although the successor has not invited the public to use a particular item manufactured by its predecessor, the very fact that it continues the predecessor's operations in substantially the same manner, including trade names and product lines, shows that it is counting upon the public's reliance on the representations made by the predecessor.¹¹²

Similarly, other policy justifications delineated in section 402A of the the *Restatement*¹¹³ also seem to encourage the imposition of liability on the successor. The public policy requiring that the costs of injuries be absorbed through insurance by those who market products applies with equal force to corporate successors. Although the successor did not place the defective item into the stream of commerce, it is essentially the only entity able to minimize the social cost of injuries through insurance.

The final justification offered by the *Restatement* which supports the imposition of liability on successor corporations is that the consumer is entitled to maximum protection from defective products and the proper parties to provide that protection are those marketing the products. Absent successor liability, the injured party will frequently go wholly uncompensated. More specifically, the Nebraska product liability plaintiff is precluded from maintaining an action against members of the distributive chain other than the manufacturer.¹¹⁴ So notwithstanding the fact that

109. See *supra* note 42.

110. See *supra* note 49 and accompanying text.

111. See *Ray*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

112. See *supra* text accompanying note 50.

113. See *supra* note 107.

114. NEB. REV. STAT. § 25-21,181 (1979) provides:

injured parties can recover from the seller in most other states,¹¹⁵ this alternative is not available in Nebraska unless the defective product was purchased directly from the manufacturer. Thus, it does not seem harsh to force the successor to absorb costs for which it would have been liable had the corporate transfer been accomplished in any manner other than by sale of assets for cash.

The court in *Jones* also found that problems of altering or expanding the traditional rules of corporate law for tort liability were accentuated by "the passage of time involved in the present case, and the multiple corporate successors"¹¹⁶ Conversely, the courts in *Korzetz*¹¹⁷ and *Ramirez*¹¹⁸ attached no legal significance to the intermediate transfer to Bontrager. Moreover, it is difficult to determine from the oblique language in the opinion what significance the *Jones* court found in these facts. Regardless of the intermediate transaction, the plaintiff remains without a remedy unless the successor is held liable. Likewise, although Amsted purchased assets belonging to Bontrager, the Johnson product line continued its public existence in much the same form it had since the days Johnson presses were manufactured by the original Johnson Machine and Press Company.¹¹⁹ Furthermore, because of a re-

No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of the product or the part thereof claimed to be defective.

115. See *supra* note 70.

116. *Jones*, 211 Neb. at 730, 320 N.W.2d at 484.

117. See *supra* text accompanying note 78.

118. *Ramirez*, 86 N.J. at 350, 431 A.2d at 820.

119. Because the district court granted summary judgment to both Amsted and South Bend Lathe, and because no mention of an indemnity agreement between the two is made in the supreme court's opinion, it is possible that the "multiple corporate successors" language referred to the Amsted/South Bend transaction rather than the Bontrager/Amsted transaction. See *supra* note 67. Since both of these corporations remain viable economic entities, if the court had not disposed of the case under the traditional corporate law rule, the issue of successor corporate liability when more than one viable corporation exists could have been addressed.

Two opinions based on the *Turner* rationale address successor liability where more than one viable corporate successor exists. In *Trimper v. Bruno-Sherman Corp.*, 436 F. Supp. 349 (E.D. Mich. 1977), a plaintiff injured by a press punch defectively manufactured by T.W. & C.B. Sheridan Company sought to recover from Sheridan's corporate successors. The assets of Sheridan had been sold to Harris Intertype Corporation (the same corporate transaction analyzed in *Turner*). Harris manufactured Sherman presses for six years and then sold the Sherman assets to Bruno-Sherman Corporation. Harris continued its operation in other fields, while Bruno-Sherman began manufacturing Sheridan presses. Following a discussion of *Turner*, which it characterized as "classic vicarious liability," 436 F. Supp. at 351, the *Trimper*

cently enacted Nebraska products liability statute of repose,¹²⁰ the court's concern with the passage of time was misplaced. The statute provides a four-year time limitation for products liability actions. It also provides that any products liability action shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was

court addressed the liability issue. Reserving the issue of Harris' continuing liability until it was properly raised, the court found that there was "no less reason for imposing such liability on Bruno-Sherman Corporation in this case than on Harris Corporation in *Turner*." *Id.*

In *Trimper v. Harris Corp.*, 441 F. Supp. 346 (E.D. Mich. 1977), the court was forced to decide the issue it had expressly reserved in its previous opinion. The court found that imposition of liability on Harris was justified because "[b]y terms of the sale from Harris Corporation to Bruno-Sherman Corporation, Harris Corporation made it possible for Bruno-Sherman Corporation to continue the illusion of continuity of enterprise between the original manufacturer and Bruno-Sherman Corporation." *Id.* at 347. Allowing the plaintiff to sue both Harris and Bruno-Sherman was found to be consistent with policies espoused in *Turner*. The court concluded by stating that "[i]t is not the injured party's concern as to how that liability, if he wins his suit, will be allocated or borne as between them." *Id.* The *Trimper* opinions are discussed in detail in *Products Liability*, *supra* note 19, at 380-85.

A companion case to *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811 (1981), *Nieves v. Bruno-Sherman Corp. and Harris Corp.*, 86 N.J. 361, 431 A.2d 826 (1981), addressed the issue presented in the *Trimper* opinions under the auspices of the product line exception. The facts in *Nieves* were essentially the same as in *Trimper*, including the identity of the corporate successors. In *Nieves*, the New Jersey Supreme Court held that both Bruno-Sherman and Harris were amenable to suit under the *Ray* analysis.

Because Bruno-Sherman continues to manufacture Sheridan presses, the court had little trouble finding that it could be liable under the *Ray* analysis. Harris argued, that because the plaintiff could seek recovery from Bruno-Sherman, and because Bruno-Sherman currently marketed the offending product line, it should be excused from liability. The court disagreed, stating that the *Ray* court had been concerned "not as much with the availability of one particular viable successor as it was with the unavailability of the original manufacturer by reason of its divestiture of assets and dissolution." *Id.* at 370-71, 431 A.2d at 831. The court found that "Harris 'became an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products,' by acquiring, producing, and later selling the Sheridan business assets. *Id.* at 371, 431 A.2d at 831 (citations omitted). The court stated that "Harris's [sic] prominent role in the overall enterprise of manufacturing Sheridan die-cutting presses is not to be overlooked merely because plaintiff's injury did not occur while Harris actually engaged in the manufacturing operation." *Id.* In conclusion, the court said:

[w]hile the *Ramirez* rationale is concerned with imposing strict tort liability for damages caused by defects in units of the product line acquired and continued by successor manufacturers, neither *Ramirez* nor the injured plaintiff . . . is concerned with how that liability will be allocated or borne as between two successor corporations.

Id. at 372, 431 A.2d at 832.

120. NEB. REV. STAT. § 25-224 (1979).

first sold or leased.¹²¹ Thus, although imposition of liability on some manufacturers and successors seems unfair because a great length of time has passed between the date of sale and the date of injury, that factor should have been irrelevant in *Jones*.

The court advanced the passage of time as a reason to maintain the traditional corporate law rule despite a legislative solution to that problem. Interestingly, the court's final justification for not holding Amsted liable was that this matter involves broad public policy issues which are more appropriately left to legislative determination.¹²² Since legislatures are able to receive input from a considerably broader spectrum of society than are courts, this argument carries a certain appeal. Unfortunately for injured persons, legislative action is often slow, if forthcoming at all.¹²³ It should be remembered that strict liability itself is a creation of the courts.¹²⁴ If a remedy which imposes liability without fault can be created by courts in order to afford greater protection to those injured by defective products, it does not seem beyond the court's competence to extend the liability flowing from that remedy to corporate successors in order to more adequately protect the same class of persons.

C. Balancing Competing Policies and Concluding Remarks

The problems associated with obtaining a proper balance between the rights of persons injured by defective products and the interest of business concerns in being able to calculate effectively the potential liability attaching in an assets acquisition are complex. Each of the approaches taken by courts in dealing with these problems have some advantages and disadvantages. On balance, however, the *Ray* product line exception approach seems the most satisfactory.

The traditional rule of non-liability, in a sale of assets transaction, affords businesses the opportunity to determine definitely the liabilities assumed by the transferee. This result allows the par-

121. *Id.* Plaintiff Jones' action was not barred because his injury occurred prior to July 22, 1978. NEB. REV. STAT. § 25-224(4) (1979) allows claims accruing before that date to be brought within two years of such date.

122. *Jones*, 211 Neb. at 730, 320 N.W.2d at 484.

123. In its last attempt to pass comprehensive products liability legislation, the Nebraska Unicameral failed. L.B. 142 died on the floor. 2 NEB. LEG. J. 2333 (1978).

124. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (first case to hold manufacturers of defective products strictly liable in tort); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461-68, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring). The Nebraska Supreme Court adopted the doctrine of strict products liability in *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971).

ties to the transaction to arrive at a purchase price with some degree of certainty, thus enhancing the marketability of business enterprises. The traditional approach, however, provides this certainty at the expense of persons injured by products manufactured by the predecessor, a result which could not be obtained had the transaction been structured as a merger or sale of stock. This exaltation of form over substance is analogous to the problems of privity and notice which led to the original adoption of the doctrine of strict products liability.¹²⁵

Even as expanded by *Knapp* and *Cyr*, the exceptions to the traditional rule are subject to criticism. By focusing on commonality of ownership and similarities between the transferor and transferee entities, the method of corporate acquisition remains the determining factor in the imposition of liability. Although the exceptions to the traditional rule provide sufficient protection for claims accruing prior to or shortly after the dissolution of the predecessor, such as the claims of business creditors or disgruntled shareholders, they remain unresponsive to claims of persons injured by defectively manufactured products. Such claims frequently arise long after the dissolution of the original manufacturer.

By abandoning the traditional approach in suits involving products liability claims against corporate successors, the *Turner* and *Ray* approaches more adequately address the rights of persons injured by defectively manufactured products than does the traditional rule and its exceptions. The *Turner* approach, however, remains subject to some of the same criticisms applicable to the traditional rule and its exceptions. By focusing on the similarity between the corporate makeup of the transferor and transferee, the *Turner* test still allows the parties to the transaction to determine the rights of injured persons. Because the *Turner* approach is based on continuity between the predecessor and the successor, it presents formidable problems to business planners. It will not always be readily apparent at the time of the acquisition how similar to the predecessor the successor will be. Thus, in arriving at a purchase price, the acquiring company will be forced to guess whether the successor corporation will be sufficiently similar to its predecessor to engender liability under the *Turner* approach.

The *Ray* product line exception seems the best approach to the problem. By emphasizing the continuation of the product line

125. The abrogation of the doctrines of privity and notice which in turn led to the creation of strict products liability is detailed in Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). See also *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (leading case).

causing the injury, the *Ray* analysis comes closest to an effective balance between the competing concerns of business planners and injured parties. If the success of a given product line provided the incentive for a corporation to purchase the assets of another corporation and to continue manufacturing that product in a substantially similar manner, it does not seem unfair to force the successor to accept responsibility for the liabilities inherent in that manufacturing process. If, on the other hand, the product line of the predecessor is unsuccessful, or if it has engendered substantial product liability in the past, the corporate planners of the successor may choose to discontinue the product line, and thus avoid future liability for products defectively manufactured by the original corporate entity.

In *Jones*, the Nebraska Supreme Court was forced to make a basic policy judgment. It chose to follow the position taken by the majority of courts in the United States, and thus adopted the traditional rule of successor non-liability in a sale of assets transaction. Because of the number of courts so holding, and because of the universal acceptance afforded the traditional rule until recently, it is difficult to characterize the court's decision as wrong. However, given the recent trend toward imposing liability on successors, and given the fact that the impetus for that trend is firmly grounded in policy considerations, the result in *Jones* would be infinitely more satisfying had it been reached on the basis of a thorough examination of those policy concerns.

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